

FCC MAIL SECTION

NOV 12 3 Before the  
Federal Communications Commission  
Washington, D.C. 20554

PR Docket No. 92-144

In the Matter of the Application

RICHARD A. BURTON  
Harbor City, California

For Amateur Station and  
Operator Licenses

### Appearances

*Kenneth Kahn* on behalf of Richard A. Burton; and  
*Thomas D. Fitz-Gibbon* on behalf of the Chief, Private  
Radio Bureau.

### DECISION

Adopted: October 29, 1992; Released: November 12, 1992

By the Review Board: MARINO (Chairman), BLUMEN-  
THAL and GREENE.

Board Member BLUMENTHAL:

<sup>1</sup> 7 FCC Rcd 4329 (1992). The Bureau described the bases for the hearing designation in these terms:

On September 11, 1981, the Bureau revoked Burton's amateur station license and affirmed the suspension of his operator license because of his willful and repeated violations of the Commission's Rules in the amateur services. *Order of Revocation and Affirmation*, PR Docket No. 81-444 (September 11, 1981). Following this action, Burton, on three separate occasions, was found in federal court to have transmitted in the amateur services without a Commission license. *United States of America v. Richard A. Burton*, No. CR 82-378-R (C.D. Cal. June 28, 1992)(conviction on four counts of transmitting without a license and two counts of transmitting obscene language); *United States of America v. Richard A. Burton*, No. 82-00378 (C.D. Cal. May 1, 1985)(finding violation of the terms of probation by operating a radio apparatus without a license, modifying sentence to include therapy); *United States of America v. Richard A. Burton*, No. CR-90-357-RMT (C.D. Cal. October 1, 1990)(conviction for transmitting without a license). *But see United States of America v. Richard A. Burton*, No. 82-1391 (9th Cir. October 25, 1983)(affirming the 1982 conviction for trans-

1. The Board has before it the Exceptions of Richard A. Burton to the *Summary Decision*, 7 FCC Rcd 5481 (1992), of Administrative Law Judge Edward J. Kuhlmann (ALJ). It also has an Opposition To Exceptions filed by the Commission's Private Radio Bureau.

2. In reaction to a *Hearing Designation Order*, released June 29, 1992,<sup>1</sup> the ALJ ordered Burton to submit an outline of evidence and a witness list by July 29, 1992. Burton filed nothing, whereupon on July 31, 1992, the Bureau moved for summary decision on the designated issues,<sup>2</sup> citing Burton's history of prior violations (*see supra* note 1). Burton filed no immediate opposition to the Bureau's motion.

3. The *Summary Decision* not only accepted the Bureau's substantive arguments for denial of the subject applications, unopposed at that time by Burton, the ALJ also noted that "Burton has not prosecuted his application in this proceeding." *Id.*, at para. 4.

### EXCEPTIONS

4. Burton makes several arguments to the Board. First, whereas Burton had originally thought to appear *pro se*, he filed through counsel a request for an extension of time to respond to the Bureau's July 31 motion for summary decision. However, Burton's time extension request was filed on August 19, but the ALJ had already "issued" his *Summary Decision* on August 18, the day before.<sup>3</sup> Burton excepts to the ALJ's grant of summary decision without first ruling on his late extension request.

5. Second, Burton claims a lack of notice in the Bureau's August 31 motion that summary decision might follow from his failure to timely submit an outline of evidence and a witness list. He claims that, to the extent that the *Summary Decision* was based on this evidentiary

mitting without a license, while overturning conviction for transmitting obscene language on First Amendment grounds).

Bureau Opposition at 3 n.1.

<sup>2</sup> The following issues were set for hearing:

(a) To determine whether, in light of the license revocation/suspension and the convictions described above, Richard A. Burton is qualified to become a Commission licensee.

(b) To determine, in light of the foregoing issue, whether granting Richard A. Burton's application would serve the public interest, convenience and necessity.

*Summary Decision* at para. 1.

<sup>3</sup> Burton, through counsel, alleges that the ALJ's secretary was notified on August 18, 1992 that an extension of time request was forthcoming. Exceptions at 3. Moreover, counsel now represents that Burton was ill, submitting a brief note from Burton's doctor dated August 6, 1992. That note, unverified and scribbled on a pharmaceutical prescription form, advises "[t]o whom it may concern" that, due to Burton's otherwise undescribed "medical condition," Burton cannot "partake in any AIR TRAVEL until his medical problems are resolved." *See id.* (and attachment "D" thereof).

failure, no proper notice was afforded, particularly in light of his later request for an extension of time to prepare such evidence.<sup>4</sup>

### DISCUSSION

6. We must deny these exceptions. As to Burton's first ground, the law is clear that, while the Commission "may, of course, consider an applicant's *pro se* status, among other factors, in determining whether a *mistake* is excusable,"<sup>5</sup> we find no "mistake" here since the ALJ's July 29, 1992 submission deadline order was clear and Burton's *pro se* status does not excuse Burton's unexplained failure to comply. See *Silver Beehive Telephone Co.*, 34 FCC 2d 738, 739 (1972). Further, in the absence of any opposition to the Bureau's substantive motion, the ALJ could consider the Bureau's arguments on the merits, note the lack of any counter-arguments, and rule on the Bureau's motion. Burton's extension of time request, filed one day after *Summary Decision* had issued, could not and did not foreclose a ruling on the merits.<sup>6</sup>

7. Burton's second argument, *i.e.*, that the Bureau's July 31 motion failed to give notice that summary decision might follow a failure to respond to the Bureau, mixes apples and avocados. *Summary Decision* was based upon Burton's undenied "ten year history of violating the Communications Act." *Id.*, at para. 4. Though the ALJ also noted Burton's failure to prosecute, *see id.*, the Bureau certainly was under no special duty to republish Section 1.961(b) of the Commission's Rules in its request for summary decision on the merits.<sup>7</sup> Burton's failure to submit the evidentiary material called for by the ALJ, and his failure to even oppose the Bureau's request for summary decision on the merits of the case (prior to the issuance of the *Summary Decision*), provided an ample basis for the *Summary Decision*.<sup>8</sup> That these pleading failures might have concurrently provided a procedural basis upon which to *dismiss* Burton's application (which the ALJ did *not* do) does not undercut the *Summary Decision*; even before the Board, Burton's exceptions do not challenge the substantive grounds for the ALJ's *denial* of Burton's application.<sup>9</sup>

<sup>4</sup> See Exceptions at 3-5.

<sup>5</sup> *Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332, 1334 (D.C. Cir. 1987)(emphasis added).

<sup>6</sup> While Burton's exceptions to the Board are cast solely in procedural terms, its "Response To Motion For Summary Decision," filed August 31, 1992 -- hence thirteen days after the *Summary Decision* issued -- argued that the ALJ could not grant summary decision based upon Burton's past criminal record, at least without an evidentiary hearing to evaluate Burton's prior conduct. Burton's underlying thesis is faulty, for a history of serious violations -- unchallenged here in any factual respect -- is a perfect basis upon which to deny an application. See *Weiner Broadcasting Co.*, 7 FCC Rcd 832 (Rev. Bd. 1992)(history of unlicensed operation adequate grounds for application denial). Burton was afforded the *right* to a hearing by virtue of 47 U.S.C. Section 309(e); by his inaction, *Summary Decision* on the issues properly followed.

<sup>7</sup> 47 CFR Section 1.961(b) reads as follows:

Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. Such dismissal will

8. ACCORDINGLY, IT IS ORDERED. That the application for amateur and operator licenses filed by Richard A. Burton IS DENIED.

### FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal  
Member, Review Board

be without prejudice where an applicant has not yet been designated for hearing; such dismissal may be with prejudice after an application has been designated for hearing.

<sup>8</sup> Compare, *e.g.*, *Beth Knight*, FCC 92-397, released September 10, 1992 affirming "dismissal of Knight's application for failure of proof and failure to prosecute..." *Id.*, at para. 2 (emphasis added). Burton's applications were not dismissed, but *denied* on the merits.

<sup>9</sup> Because of Burton's lack of a substantive argument on the merits of the ALJ's application denial, we need spend little time on the procedural matters. However, we gratuitously observe that apart from alluding to an utterly undescribed "medical condition" that was said to have impeded Burton's ability for "air travel," no explanation is given for his failure to submit the evidentiary materials by July 29, 1992 or to *timely* request an extension to so file. No "good cause" appears to be pleaded for these failures; and the ALJ's "failure" to rule upon an extension request filed *after Summary Decision* had issued does not effect the validity of that *Decision*, nor does Burton's response to the Bureau -- filed thirteen days after the *Decision* had issued -- do so. See 47 CFR 1.251(b)(opposition to motions for *Summary Decision* must be filed with 14 days of motion).